

HOUSE OF LORDS.

Sir *John Eden*, Baronet, *Robert Eden*, Esquire, *Frederick Eden*,
Son of the said *Robert Eden*, by the said *Robert Eden* his Father
and next Friend, *Jonathan Davison* and *George Hartly*, Esquires, } Appellants,
standing by Revivor in the Place of *Morton Davison*, Esquire,
deceased, — — — — — }

The Right Honourable *John Earl of Bute*, the Right Honourable
Henry Lord Ravensworth, *Mary Bowes*, Widow, the Right
Honourable *John Earl of Strathmore*, the Right Honourable
Mary Eleanor Countess of Strathmore his Wife, the Right Ho- } Respondents,
nourable *John Bowes*, commonly called Lord *Glamis*, by the
said *John Earl of Strathmore* his Guardian, — — — — — }

The CASE of the Appellants,

On their Appeal presented the 25th Day of *January* 1774.

ON the 17th Day of *April* 1727 Heads of an Agreement in Writing were made between *William Davison*, Esq; since deceased, of the One Part, and *Ralph Fetherstonehalgh*, for and on the Behalf of *George Liddell*, *George Bowes*, *Edward Wortley*, and *Thomas Ord*, Esqrs. of the other Part; whereby the said *William Davison*, among other Things, agreed to make and execute a Lease to the said several Persons of Liberties of Way-leave and Water-course over and through his Lands, Grounds, Moors, Wastes, or Commons at *Beamish* alias *Beamish Park* and *Pockerley*, in the County of *Durham*, or any of them, for the Use of their Coal Mines and Collieries, for such Term of Years, and under such Rent, Covenants, and Conditions, and with such Power to determine the Term on the Part of the Lessees, as therein are mentioned, and which Agreement was afterwards signed by all the Parties.

Morton Davison, Esq; the late Appellant, claiming under the said *William Davison* the Benefit of the said Agreement, in *Trinity Term* 1766 exhibited his Bill in the Court of Chancery against the Respondents *John Earl of Bute*, *Henry Lord Ravensworth*, and *Mary Bowes* and *Jane Bowes*, since deceased; and the said Bill was afterwards amended, and the Respondents *John Earl of Strathmore*, *Mary Eleanor Countess of Strathmore*, and *John Lord Glamis* were made Parties Defendants thereto, the said several Respondents claiming under the Lessees named in the said Agreement the Benefit thereof; and the said *Morton Davison*, among other Things, prayed by his said Bill that a Lease might be made of Liberties of Way-leave and Water-course agreed to be demised by the said Heads of Agreement in the Pleadings of the Cause mentioned pursuant to the same Agreement, and that such Restraints, Covenants, and Provisoos as the Court should think fit, necessary, and reasonable might be inserted in such Lease; and that the Liberties of Way-leave and Water-course to be demised in and by such Lease might be restrained and confined thereby to such Coal Mines and Collieries as the Lessees named in the said Agreement had upon the said 17th Day of *April* 1727, or at the making and executing of the same, and which the Lessees to be named in such Lease then had as standing in their Places, and to no other Coal Mines and Collieries.

The Defendants put in their Answers to the said Bill, and thereby said, They were willing and desirous specifically to perform the Agreement contained in the said Heads of Agreement, or such Parts thereof as remained undetermined and were capable of being performed and carried into Execution, and that a Lease might be made under the Direction of the Court pursuant to the said Heads of Agreement, and that all such Restraints, Covenants, and Provisoos as the Court should think fit, necessary, and reasonable might be inserted in such Lease; but insisted that the Liberties of Way-leave and Water-course mentioned in the said Heads of Agreement were meant and intended by the said *William Davison* to extend to all the Collieries which they should at any Time afterwards be possessed of

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during

during the Term of 98 Years, as well as those the Lessees were possessed of at the Time of entering into the said Agreement.

The late Appellant having replied to the Defendants Answer, the Defendants rejoined, and the Cause being at Issue, several Witnesses were examined on both Sides, and the Cause coming on to be heard before the Lord Chancellor the 7th, 8th, and 9th Days of *December* 1773, his Lordship, on the Case made by the Appellant, pronounced his Decree in the said Cause on the said 9th Day of *December*, and declared, that according to the true Construction of the Heads of the Agreement of the 17th *April* 1727, the Lessees Right of Way-leave and Water-course extends to all the Coal Mines and Collieries in their Possession at that Time, or which they should afterwards be possessed of during the Term, and did order and decree that it should be referred to a Master to approve of a Lease pursuant to the said Heads of Agreement, with Covenants usual in such Leases.

The late Appellant conceiving himself to be aggrieved by so much of the said Decree as declares that according to the true Construction of the Heads of the Agreement of the 17th *April* 1727, the Lessees Right of Way-leave and Water-course extends to all the Collieries and Coal Mines in their Possession at that Time, or which they should be afterwards possessed of during the Term, on the 19th Day of *January* 1774 presented his Appeal therefrom to the House of Lords, and the same is now depending.

On the 10th Day of *January* 1774 the Respondents preferred a Petition to the Lord Chancellor, stating, That his Lordship, on the Hearing of the said Cause, made a Decree therein in their Favour—that they had several Proofs taken in the Cause, and several Exhibits to be read, which they found by the Register's Minutes were not entered as read, and that there was no Direction given for entering the Proofs and Exhibits as read, which they were advised was very material to be done—that they also found by the said Minutes that the Master was to approve of a Lease pursuant to the Heads of Agreement in the Pleadings mentioned, with Covenants usual in such Leases; but they apprehended, that the Direction should have been "That the Master do approve of a Lease pursuant to the said Heads of Agreement," without any special Directions touching the Covenants to be contained in such Lease; and the said Respondents, by their said Petition, prayed his Lordship to rectify the Minutes in the Particulars before-mentioned.

All Parties concerned being ordered to attend his Lordship on the Matter of the said Petition upon the next Day of Petitions, and the late Appellant having Notice thereof, did attend by his Counsel accordingly; and the said Petition coming on to be heard on the 21st of *January* 1774, his Lordship, among other Things, was pleased to order that the Evidence on both Sides should be entered as read, and that Part of the Minutes which directs the Master to approve of a Lease pursuant to the Heads of the Agreement in the Pleadings mentioned, with Covenants usual in such Leases, should be rectified in the Manner therein mentioned.

No Evidence at the Hearing of the said Cause was read or offered to be read, or even the Purport of any Evidence stated on the Part of the Respondents; but the Lord Chancellor's Decree was founded upon the Construction of the Agreement only, as appears from the Decree itself.

The late Appellant conceiving himself to be aggrieved by so much of the said last-mentioned Order as directs the Evidence on both Sides to be entered as read, on the 25th of *January* last, presented his Appeal therefrom, which, by an Order of this House made in the said Cause the 1st Day of *March* last, stands revived in the Names of the now Appellants, who humbly hope that the last mentioned Order will be reversed for the following, among many other Reasons, that will be offered at the Hearing of the Appeal,

R E A S O N S :

The Decree on the Hearing of the Cause was the Judgment of the Court on the Construction of the Agreement; the Agreement itself, with such Part of the Evidence as had been read by the Plaintiff, was all that was then before the Court. No Evidence was at that Time offered on the Part of the Defendants in Support of the Construction they contended for; and if any had been offered, it would have



have been objected to, great Part of what has been taken on their Behalf being, as the Plaintiff was advised, inadmissible. The Purport and Nature of the Evidence was not on the Hearing of the Cause, or on the Defendant's Petition either read or stated to the Court. Upon the Hearing of all Appeals to a superior Court from an inferior Court, this Principle universally prevails, that no Evidence can be received on the Hearing of an Appeal which was not laid before the Court below, nor can any Evidence which was received below be objected to above, unless the Admission of improper Evidence be among the Points of the Appeal; if it was otherwise, the superior Court, instead of determining on the Rectitude of the Decree appealed from, would be exercising an *original*, not an *appellate* Jurisdiction, and might appear to be imputing Errors to the Court below, where there was no Pretence that any had been committed. It is not unusual to rectify Minutes taken at the Time of pronouncing a Decree, where, by Mistake, something that really passed, and ought to have been entered, has been omitted: But the Objection here is, that the Order, though founded on a Petition to rectify the Minutes, applies to a Point in which the Minutes were not wrong; but clearly right; and the entering this Evidence as read is not conformable to, but directly against the Truth of the Case: There may have been Instances where, with a View to save Time, Evidence; *which has been stated of One Side, admitted of the other, and judged of by the Court*; has been entered as read, although it was not actually read at the Hearing; but an Order to enter Evidence as read, which was not read, nor at all in the Consideration of the Court at the Time of pronouncing the Decree, is conceived to be without Precedent. And, if on the Hearing of the Appeal in this Cause from the Lord Chancellor's Decree, the Evidence on both Sides is to be gone into, a Case will be laid before the House totally different from that which was before his Lordship.

E. THURLOW.
J. DUNNING.
L. KENYON.

HOUSE OF LORDS.

Sir *John Eden*, Baronet, and others, }
standing by Revivor in the Place of } Appellants;
Morton Davison, Esquire, deceased, }

The Right Honourable *John Earl of* }
Butt, and others, — — — } Respondents.

The CASE of the Appellants on their
Appeal presented the 25th Day of
January 1774.

To be heard at the Bar of the House of Lords on
the Day of 1774.

